

TOWN OF UPTON

CONSULTANT AGREEMENT FOR MANAGEMENT OF THE TOWN'S MUNICIPAL AGGREGATION PROGRAM AND ENERGY-RELATED SERVICES

This Consultant Agreement is made and entered into this _____ day of _____, 2016, by and between the Town of Upton ("Town"), a municipal corporation having its principal place of business at One Main Street, Upton, MA 01568 as represented by Blythe C. Robinson, Town Manager acting for and on behalf of the Town who signs these presents in her official capacity and incurs no liability in her individual capacity, and Colonial Power Group, Inc., having its principal place of business at 277 Main Street, Marlborough, MA 01752 ("Consultant"). It is agreed between the parties hereto as follows:

SCOPE OF SERVICES, DELIVERABLES: The scope of services to be performed by the Consultant shall be all of the services contained in and reasonably inferable from this Agreement, including Attachment A appended hereto and made a part hereof. Consultant shall perform its services using best efforts, and with reasonable diligence and reasonable care.

Consultant shall fully cooperate with and assist the Town and its agents in connection with the preparation of an aggregation plan and, if applicable, energy plan under G.L. c. 164, § 134, including without limitation meeting with representatives of the Town at such times and with such frequency as reasonably necessary; preparing such plans in consultation with the Town and Massachusetts Department of Energy Resources (DOER); soliciting approval of such plans from the Massachusetts Department of Public Utilities (DPU) and the Town's consumers; and preparation of a public-education program regarding such plans. The Consultant represents and warrants that it is an electricity broker licensed by the DPU; that it is thoroughly familiar with all laws and regulations of the Commonwealth of Massachusetts addressing electricity aggregation, as well as the "Guide to Municipal Aggregation in Massachusetts" published by DOER; and that it shall perform all services under this Agreement in accordance with such laws and regulations, as well as all other applicable laws and regulations.

CONTRACTUAL RELATIONSHIP: The Consultant shall provide services described in the contract documents, which shall be as detailed in the specifications contained in the Request for Proposals which are incorporated herein and made a part hereto, including all addenda issued prior to execution of this Agreement. While so performing the services under this Agreement, the Consultant and the Town agree, understand and recognize that pursuant to and for the purposes of M.G.L. c. 149, § 148B, the Consultant is an independent contractor, and, therefore: (1) Consultant is free from the Town's control and direction in connection with the performance of the service, both under this Agreement and in fact; and (2) the service is performed outside the usual course of the business of the Town; and, (3) the Consultant is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the execution of the services to be performed by Consultant hereunder.

APPLICABLE LAW: This Agreement shall be subject to and construed in accordance with all applicable laws and regulations, which are incorporated herein by reference and shall control in

the event of a direct, irreconcilable conflict between the provisions of such laws and regulations and the provisions of this Agreement.

PAYMENT TERMS AND SCHEDULE: The Consultant shall, during the term of this Agreement, receive a price of .001 per kilowatt hour (kWh) for each kWh purchased by a participating consumer under the Town's aggregation plan. Said price per kWh shall be the complete price for all services furnished and all expenses incurred by the Consultant, and shall be paid directly to the Consultant by the Competitive Supplier. The Town shall not have any liability with respect to such payment, including without limitation in the event of any failure of the Competitive Supplier to make such payments. Notwithstanding the foregoing, the Town may, before the execution of any contract with any Competitive Supplier, and in its sole discretion, elect to discontinue, at any time and for any reason, its plan of aggregation, and in such event, terminate this Agreement without any liability. In the event the Town enters into a contract with a Competitive Supplier, nothing in this Agreement shall prevent the Town from terminating such contract with the Competitive Supplier and, thereafter, this Agreement without any liability.

TAX COMPLIANCE: The Consultant, by signing this Agreement, hereby certifies under penalties of perjury, in accordance with M.G.L. c. 62C, § 49A, that it has complied with all laws of the commonwealth relating to taxes, reporting of employees and contractors, and withholding and remitting of child support.

UNEMPLOYMENT CONTRIBUTION: The Consultant has provided certification of unemployment contribution or payments in lieu of contributions in accordance with M.G.L. c. 151A, § 19A.

DEBARMENT; NON-COLLUSION: The Consultant certifies under penalty of perjury that the said undersigned is not presently debarred from entering into a public contract in the Commonwealth of Massachusetts under the provisions of M.G.L. c. 29, § 29F, or any other applicable debarment provisions of any other chapter of the Massachusetts General Laws or any rule or regulation promulgated thereunder; and that its bid or proposal, if any, submitted in response to the any solicitation culminating in this Agreement was made and submitted in good faith and without collusion or fraud with any other person (as used in this certification, the word "person" shall mean any natural person, business, partnership, corporation, union, committee, club, or other organization, entity, or group of individuals).

INDEMNIFICATION: In addition to all other rights and remedies available to the Town, Consultant agrees as follows: The Consultant, at its expense, shall to the maximum extent permitted by law, indemnify and save harmless the Town, its officers, agents and employees from and against any and all damages, liabilities, actions, suits, proceedings, claims, demands, losses, costs, and expenses (including reasonable attorney's fees) for any personal injury or property damage or other damages that the Town may sustain which arise out of or in connection with the performance of this Agreement by the Consultant, its employees, agents or other persons acting on Consultant's behalf or for whom Consultant is responsible, including but not limited to negligence and/or reckless or intentional conduct of the Consultant, its agents, officers, employees, sub-consultants, or subcontractors. The existence of insurance shall in no way limit

the scope of this indemnification obligation. The Consultant further agrees to reimburse the Town for damage to the Town's real or personal property caused by the Consultant, its employees or agents, unless damage is caused by the Town's gross negligence or willful misconduct. After prompt notification of a claim by the Town, the Consultant shall have a reasonable opportunity to participate in the defense of such claim and any negotiated settlement agreement or judgment. The Town shall not be liable for any costs incurred by the Consultant arising under this paragraph.

INSURANCE: The Consultant shall maintain, during the full term of this Agreement, the insurance set forth below. Such insurance shall be written on an occurrence basis, be primary and non-contributory, and shall provide by endorsement that the Town is added as an additional insured to the General Liability policy, that Consultant waives rights of subrogation, and that the Town shall receive advance written notice of any cancellation of any such insurance policy.

General Liability

\$~~32~~,000,000 per occurrence

\$~~54~~,000,000 aggregate

Automobile Liability

\$1,000,000 – hired/non-owned auto liability

Workers' Compensation Insurance

\$1,000,000 employer's liability limit

Professional Liability Insurance

Minimum Coverage \$1,000,000 per occurrence

Prior to commencement of any work under this Agreement, the Consultant shall provide the Town with Certificates of Insurance which include the Town as an additional named insured and which include a thirty day notice of cancellation to the Town.

ASSIGNMENT PROHIBITED: The Consultant agrees that it will not be permitted to assign, subcontract or underlet the Agreement, nor assign either legally or equitably, any monies hereunder, or its claim thereto, without the previous written consent of the Board of Selectmen.

AMENDMENTS OR CHANGES: Any amendments or changes to this Agreement must be in writing and signed by officials with authority to bind the Consultant and the Town.

ABANDONMENT OF WORK OR OTHER DEFAULT: The Consultant agrees that any failure of Consultant to perform, timely and properly, all services required by this Agreement, such as, without limitation, Consultant's abandonment or delay of services, or Consultant's failure to supply required reports after the date of execution of this Agreement, shall be a breach of this Agreement for which the Town may terminate the Agreement under the provision for termination below. The Town may, in the event of such termination, or in lieu of termination but without waiver of its right to terminate the Agreement, and by whatever legal remedies are available to it, complete or cause to be completed, the work or services not performed (or not

properly or timely performed) by Consultant, and the Consultant shall be responsible for the entire cost of the Town's completion of such work or services. Consultant shall forthwith pay such costs to the Town, as well as any and all losses, damages, costs and expenses, including attorney's fees, sustained or incurred by the Town by reason of completing such work or services. In such event, except as may be required by law, the Town shall have no obligation to have such work and services performed at the lowest price.

PROCUREMENT ERRORS: If errors in the procurement or bidding laws or regulations of the Commonwealth, whether said errors were made by the Consultant or the Town, are found to exist by any agency of the Commonwealth or by any court of competent jurisdiction, this Agreement may be voided by the Town without liability. The Town makes no representations concerning the applicability or inapplicability of any procurement or bidding laws to this Agreement.

TERMINATION: This Agreement shall expire on the date specified in this Agreement, unless this date is properly amended in accordance with all applicable laws and regulations prior to this date, or unless terminated earlier under this Section upon prior written notice to the Consultant, or in accordance with any other provision of this Agreement allowing for termination, or as may otherwise be permitted by law; provided however, that it is further agreed by the Consultant that any breach by the Consultant of the provisions of this Agreement shall be sufficient cause for the Town to terminate this Agreement five (5) calendar days after the date of a written notice to the Consultant, which 5-day period shall not constitute a cure period.

SEVERABILITY: The provisions of this Agreement are severable. If any provision of this Agreement is held invalid or if any court of competent jurisdiction holds any provision unlawful or not legal, the remaining provisions shall remain in effect, unless such invalidity materially and adversely affects an essential purpose of this Agreement, in which event the entire Agreement shall be deemed invalid.

ENTIRE AGREEMENT CLAUSE: The Town and the Consultant agree that this Agreement and its attachments constitute the entire Agreement between the Town and the Consultant, and no other binding agreement exist other than those incorporated herein.

DURATION OF CONTRACT: It is agreed the duration of this Agreement shall be 3 years with options to renew/extend for an additional 3 years. These options are exercisable solely at the Town's discretion. It is understood and agreed that there is no financial contractual obligation of the Town in this Agreement or in any years subsequent to the fiscal year in which this Agreement is executed.

IN WITNESS WHEREOF, the said Consultant, and the said Town hereto set our hands and seals.

**FOR THE CONSULTANT
BY:**

Mark Cappadona, President

Date: _____

**FOR THE TOWN OF UPTON
BY ITS BOARD OF SELECTMEN:**

Kenneth E. Picard

James A. Brochu

Robert J. Fleming

Date: _____

ATTACHMENT A

SCOPE OF SERVICES / DELIVERABLES

1. OBTAINING AND ANALYZING LOAD DATA

The Consultant shall obtain and analyze the electrical load data for all consumers of electricity in the Town.

2. PREPARATION AND ISSUANCE OF RFP's FOR SUPPLY OF POWER

The Consultant shall develop a Request for Proposals ("RFP") for power supply for review and approval by the Town. In general, the procurement document shall include several components:

1. a description of the load aggregation (potential size of the aggregated load, and the number of customers and/or accounts);
2. the services and features desired by the Town;
3. the qualification criteria required in order to have a bid considered;
4. the criteria used to select the supplier;
5. the essential provisions of the standard contract between the chosen supplier and the Town on behalf of participating eligible consumers;
6. the term of service;
7. such other information as required by the Town.

The Consultant shall assist the Town with the review and analysis of all responsive and responsible bids from suppliers, and shall be responsible for recommending the bid that is in the best interests of the Town and meets the goals of the Town's Municipal Aggregation Program. Bids from suppliers shall be evaluated based on price, the supplier's proposed contract terms and conditions, reputation of supplier, quality of supplier's service, extent to which service meets Town's needs, supplier's past relationship with the Town, previous work experience with governmental agencies, and such other criteria set forth in the RFP. The Consultant shall conduct a reasonable investigation of the qualifications and responsibility of each bidder, including verifying references for similar supply contracts, if available.

3. BROKER SERVICES AND NEGOTIATIONS FOR SUPPLY CONTRACT

The Consultant shall, in consultation with the Town, act as the Town's broker during the procurement process. The Consultant shall provide all services during the negotiations and term of any contract with prospective power suppliers.

4. CUSTOMER ENROLLMENT / TRANSITION PROCESS

After approval of the price and term of the agreement by the Town with a supplier, the Consultant shall take all measures necessary to effectuate the transfer of customer data from the local distributor to the new supplier. The Consultant shall, in consultation with the Town, also develop and manage the customer enrollment and opt-out process.

The Consultant shall have established procedures to promptly respond to:

1. consumer queries and problems;
2. power supplier problems;
3. Distribution Company problems; and
4. media queries.

5. PUBLIC EDUCATION

The Consultant shall, in consultation with the Town, prepare or cause to be prepared all informational and educational materials for the general public and for the media, subject to the approval of the Town, including meetings with representative from the media. The Consultant shall prepare a recommended public education and information strategy to be used as part of the municipal aggregation program following commencement of the supply contract.

6. LEGAL ASSISTANCE

The Consultant shall prepare all required filings for the Department of Energy Resources, the Department of Public Utilities, and any other state agency if applicable.

7. MANAGEMENT OF MUNICIPAL AGGREGATION PROGRAM

The Consultant will administer and provide oversight of the Town's Municipal Aggregation Program including, without limitation:

1. monitoring and reporting on compliance by the supplier with all contract terms and conditions;
2. resolution of contract issues;
3. administration of the "opt-out" process for customers;
4. participation in negotiations with the competitive suppliers and the distribution company serving the Town relating to the Municipal Aggregation Program;
5. preparation of written reports on the ongoing operations of the Town's Municipal Aggregation Program to be submitted on a quarterly basis to the Town; and
6. routine updates and attendance at meetings with the Town officials, Board and Committees.

8. MAINTENANCE OF EFFORT

After a contract is executed between the Town and an electricity supplier, if at all, the Consultant shall conduct regular, ongoing power supply analyses, be the advocate for ratepayers, provide prompt answers to questions from ratepayers, and provide a hotline and web site where ratepayers can seek information related to the Town's Municipal Aggregation Program.

The Consultant shall provide a written report concerning the following issues and items to the Town on a quarterly basis:

1. supplier's compliance with all terms and conditions of contract;
2. contract issues and resolutions, if any;
3. whether supplier's contract milestones have been met;
4. administration/customer service, defaults, litigation and penalties, if any;
5. customer participation;
6. changes in the financial stability of the supplier, if any; and
7. changes in organizational structure of the supplier, if any.

The Consultant shall provide a written report concerning the following issues to the Town prior to the expiration, extension or renewal of the supplier contract:

1. assessment of achievement of contract milestones;
2. possible revision or upgrading of goals;
3. market assessment or new feasibility study if conditions in the service area or operations have changed significantly;
4. public process to affirm goals and evaluation;
5. bidding and negotiation process;
6. formulation of new contract; and
7. service transition process, if needed.